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No. 91-905

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. The general thrust of respondents' Brief in Opposition is that the decision of the court of appeals is "narrow" and has "no significant impact on the administration of the immigration laws." Br. in Opp. 16. To the contrary, the court of appeals has held that unspecified provisions of the Constitution prohibit a significant program that indisputably affects thousands of children a year,[1] all the while acknowledging that the program

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[1] Respondents chide us (Br. in Opp. 20 & n.15) for noting in our petition (Pet. 25) that INS has advised us that it held approximately 1700 hearings while it complied with the district court's order pending appeal, and suggest, based on information obtained under the Freedom of Information Act, that they believe the

fully comports with the intent of Congress as reflected in Title 8. Whatever the merits of this decision, it is certainly not correct to characterize it as narrow.

Along the same vein, respondents claim (Br. in Opp. 23-24) that INS has substantially narrowed the dispute by modifying the policy that was considered by the courts below. This claim is completely unjustified. The National Policy reprinted in Br. in Opp. App. 1a-4a does not present a major change and is in all important respects identical with the consent decree (Pet. App. 148a-204a) on which the decision below was premised. See Pet. 6-8 (discussing consent decree). At the core of both documents is INS's decision that it generally will transfer detained alien children to a juvenile care facility within 72 hours. Compare Pet. App. 148a-149a ("except in unusual and extraordinary circumstances * * * the federal defendants shall house all juveniles detained more than 72 hours following arrest in a facility [that meets the standards of the Child Care Memorandum described at pages 6-8 of the petition]") with National Policy § 3, Br. in Opp. App. 2a ("No alien minor may be held in a detention facility, whether an INS

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number of hearings was much smaller. Respondents concede in the same passage, though, that it is perfectly proper to direct the Court's attention to official agency records that may be relevant to an issue before the Court.

Since we received respondents' brief, the Executive Office of Immigration Review has reviewed its official computer records and explains that the number of hearings identified in our petition was accurate, but that the hearings took place over a 40-month period (from June, 1988, through September, 1991), rather than a 22-month period, as stated in the petition; similarly, the much smaller number identified in the Brief in Opposition is correct, but covers a still smaller 15-month period. We seriously regret any inconvenience the confusion over these statistics may have caused the Court. In any event, the fact remains that the 1700 unnecessary hearings present a considerable diversion of administrative resources, even when spread over the longer period.

facility or otherwise, longer than 72 hours [except in unusual circumstances detailed in the six following subparagraphs]."). As we stated in our petition (Pet. 7 n.8), the practice "throughout the country generally [has] follow[ed] the terms of the decree"; the policy on which respondents rely is nothing more than a formalization of the informal policy described in note 8 of our petition.[2]

2. Respondents also argue (Br. in Opp. 9-15) that unsatisfactory conditions in INS detention facilities justify the relief entered by the courts below. The problem with this argument, though, is that these deplorable conditions were addressed and remedied during earlier proceedings in this case, including the detailed and comprehensive consent decree described at pages 6-8 of our petition. See Pet. App. 148a-204a (reprinting the consent decree and the descriptive materials attached to it).[3] Furthermore, the caliber of INS's compliance

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[2] Respondents err in claiming (Br. in Opp. 3, 23) that provisions of the National Policy allowing release to responsible adults designated by the parent or to licensed child-care represent significant changes from prior practice. The provision allowing release to responsible parents, see National Policy § 4(b), Br. in Opp. App. 3a, parallels 8 C.F.R. 242.24(b)(3) (discussed at Pet. 6), which at all relevant times has allowed release to persons designated by the parent. Similarly, the provision allowing release to licensed child-care facilities parallels the provision in 8 C.F.R. 242.24(b)(4) (discussed at Pet. 6) allowing release to other adults in unusual circumstances, as well as the requirement of the CRS Standards (discussed at Pet. 6-7) that juvenile care facilities comply with state licensing requirements. See Pet. App. 176a.

[3] For example, respondents' description of the facilities as involving barbed wire, security fences, and other prison-like characteristics (see Br. in Opp. 9-10) is addressed by the requirement that the shelters provide "an open type of setting without a need for extraordinary security measures." Pet. App. 173a. Similarly, the concerns regarding education and recreation (Br. in Opp. 11-12) are addressed in detailed requirements for "a structured classroom setting, Monday through Friday," with a curriculum that "concen-

with that decree is totally irrelevant to the question presented by the petition: whether, *in light of that decree*, the Constitution nevertheless prohibits INS from declining to release a child to an unrelated adult unless it can produce affirmative evidence of the likelihood that the adult would harm the child. In sum, respondents' remedy for a violation of the consent decree is an order enforcing the decree, not, as respondents implicitly suggest, an order based on the Due Process Clause requiring INS to release children to unrelated adults.[4]

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trates primarily on the development of basic academic competencies," Pet. App. 182a, requirements for bilingual services as appropriate, *id.* at 173a, 183a, and requirements for supervised recreation as well as specified recreation equipment, *id.* at 183a. Furthermore, the materials discussed by respondents at Br. in Opp. 13-15, which suggest that it would be better to release children to unrelated adults than to jail them, are beside the point because the consent decree requires that the children covered by the order of the court of appeals not remain in detention facilities for more than 72 hours except in "unusual and extraordinary circumstances." Pet. App. 148a.

The other concerns raised in this section of respondents' brief are addressed by other provisions outside the consent decree. First, the concern regarding INS's failure to segregate children from adults of the opposite sex (Br. in Opp. 10) is addressed by 8 C.F.R. 242.24(d), which requires the juvenile to be housed apart from unrelated adults, unless the juvenile is in the care of a related female adult. See Pet. 6 n.6. Finally, as respondents themselves note (Br. in Opp. 11 n.9), the allegations regarding strip searching (Br. in Opp. 11) were dealt with in a separate injunction issued by the district court in 1988. See *Flores* v. *Meese*, 681 F. Supp. 665 (C.D. Cal. 1988).

[4] Respondents also suggest (Br. in Opp. 7 n.5) that the period in INS custody is unreasonably delayed because of the unwillingness of Los Angeles courts to grant temporary guardianship to respondents. As the record shows, however, the state court took this action only in response to an order by the federal district court regarding an abuse of temporary guardianship appointments by alien children and their representatives, pursuant to which "after

3. Finally, respondents contend (Br. in Opp. 21-23) that the government's position is inconsistent with this Court's recent decision in *INS* v. *National Center for Immigrants' Rights*, 112 S. Ct. 551 (1991) (*NCIR*). Relying on the Solicitor General's statement that the INS does not impose no-work conditions on alien bonds without first making an individualized determination that the aliens are ineligible for work, respondents argue that the decision requires the INS to conduct individualized hearings in each case to determine the suitability of release to any available adult.

This argument begs the question at issue in this case. As we explain in our petition, the central issue is whether the Constitution requires the government to release an alien child to an unrelated adult in the absence of specific evidence that the adult will harm the child. See Pet. 23. If the government is entitled, as a substantive matter, to prohibit release to unrelated adults (without regard to the existence of any particularized evidence of risk to the child), then it would be pointless to require a hearing on the question. See Pet. 23 n.21. In our view, the only relevant fact in this situation is whether there is a related adult available to whom the child can be released. There is no more reason to believe a formal hearing is required on that point than there was to require a formal hearing in *NCIR* to determine the alien's eligibility for work. See *NCIR*, 112 S. Ct. at 558-560.

In sum, respondents' arguments in favor of individualized hearings can prevail only if they establish that the Constitution prohibits INS from adopting the substantive standard respondents challenge in this case. We believe the court of appeals' conclusion that

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such appointment is made, the guardian and the minor were never seen again." Clerk's Record, entry 14 (July 19, 1985 minute order).

the Constitution does prohibit INS from adopting that standard merits plenary review.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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FEBRUARY 1992

☆ U.S. GOVERNMENT PRINTING OFFICE 1992-312-324/45322